

228529



Eric M. Hocky  
Direct Dial 215 640 8523  
Email: ehocky@thorpreed.com

ATTORNEYS AT LAW SINCE 1895

VIA ELECTRONIC FILING

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20024

December 23, 2010

Re: Delta Southern Railroad, Inc. – Abandonment Exemption –  
Between Lake Village, Ark., and Shelburn, LA  
STB Docket No. AB-384 (Sub-No. 1 X)  
*Petition of Lake Providence Port Commission to Strike Notice of  
Consummation and to Reopen and Reconsider*

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is the Petition of Lake Providence Port Commission to Strike Notice of Confirmation and to Reopen and Reconsider.

As set forth in the Petition, the Port Commission is a “government entity”. Therefore any filing fee that would apply should be waived in accordance with the Board’s policy as set forth in 49 CFR 1002.2(e)(1).

Please let me know if there are any questions regarding this filing.

Respectfully,

  
Eric M. Hocky

*Counsel for Lake Providence Port  
Commission*

ENTERED  
Office of Proceedings

DEC 23 2010

Part of  
Public Record

EMH/e  
Enclosure  
cc (via email):

Thomas F. McFarland, Esq.  
Wyly Gilfoil

Pittsburgh

Philadelphia

Princeton

Wheeling

Thorpe Reed & Armstrong, LLP  
One Commerce Square  
2005 Market Street  
Suite 1000  
Philadelphia, PA 19103-7041  
215 640 8500  
215 640 8501 Fax

(P0110762) (STB filing)

**FILING FEE WAIVED**

Before the  
**SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 384 (Sub-No. 1X)

---

**DELTA SOUTHERN RAILROAD, INC.  
- ABANDONMENT EXEMPTION -  
BETWEEN LAKE VILLAGE, ARK., AND SHELburn, LA**

---

**PETITION OF LAKE PROVIDENCE PORT COMMISSION  
TO STRIKE NOTICE OF CONSUMMATION  
AND TO REOPEN AND RECONSIDER**

Eric M. Hocky  
Thorp Reed & Armstrong, LLP  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103  
215.640.8500  
[ehocky@thorpreed.com](mailto:ehocky@thorpreed.com)

Attorneys for Lake Providence Port  
Commission

Dated: December 23, 2010

Before the  
**SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 384 (Sub-No. 1X)

---

**DELTA SOUTHERN RAILROAD, INC.  
- ABANDONMENT EXEMPTION -  
BETWEEN LAKE VILLAGE, ARK., AND SHELburn, LA**

---

**PETITION OF LAKE PROVIDENCE PORT COMMISSION  
TO STRIKE NOTICE OF CONSUMMATION  
AND TO REOPEN AND RECONSIDER**

On December 8, 2010, Delta Southern Railroad, Inc. ("DSR") filed a notice of consummation with respect to the abandonment of an 8.2 mile segment of rail line between milepost 454.8 at the Arkansas-Louisiana state line, and milepost 463.0 at or near Shelburn, Louisiana. The notice purports to have consummated the abandonment as of December 6, 2010.

**Background**

As is relevant here, DSR at one time operated a line of railroad (the "Lake Providence Line") that ran between a connection with Union Pacific Railroad ("UP") at McGehee, Arkansas, and a connection with Kansas City Southern ("KCS") at Tallulah, Louisiana. Lake Providence Port Commission (the "Port Commission") is a governmental agency created by Act 450 (R.S. 1501 et seq.) of the 1958 regular session of the Louisiana Legislature. It operates an inland port facility in Lake Providence served by DRS. In the past, traffic could move north or south from the Port.

In 2004, DSR commenced this proceeding by filing for authority to abandon a 30-mile segment in the middle of the line between McGehee and Tallulah. The Port Commission and other

shippers in the area sought to save the northbound shipping option through the offer of financial assistance (“OFA”) process. Although the OFA process did not lead to a sale, a 22-mile portion of the line between Lake Village, Arkansas and the Arkansas-Louisiana state line was sold to Southeast Arkansas Economic Development District (“SEAEDD”) for continued rail service. Since that time, there were periodic talks between the Port Commission and DRS about service to the Port, possible new business and the Port Commission’s interest in acquiring the remaining 8.2 miles subject to abandonment. DRS sought and received a series of extensions to the consummation deadline.

In October, 2010, DSR obtained its most recent extension of the time to consummate the abandonment of the remaining 8.2-mile segment on the grounds that it was trying to sell the line for continued rail service. At the time of the request, the time for consummation had expired. On the basis of the representation the extension was granted. *See Delta Southern Railroad, Inc. – Abandonment Exemption – Between Lake Village, Ark. and Shelburn, LA*, STB Docket No. AB 384 (Sub-No. 1X) (served October 22, 2010) (the “October 22 Decision”).

Shortly, thereafter, on November 9, 2010, DSR filed to abandon a second segment of the line – approximately 8 miles from Shelburn, LA, south to East Carroll Parish, LA (approximately 2 miles north of the Port in Lake Providence). *Delta Southern Railroad, Inc. – Abandonment Exemption – In East Carroll Parish, LA*, STB Docket No. AB 384 (Sub-No. 2X). As soon as the Port Commission on December 7, 2010, expressed interest in making an OFA for this additional segment of the line to be able to preserve service options to the north (by sending a request for information) second abandonment, DSR filed its notice of consummation.<sup>1</sup> The Port Commission remains interested in

---

<sup>1</sup> DSR has also filed a petition to abandon the remaining northern segment of the Lake

preserving the line between the Port and McGehee, Arkansas for future rail service. It has already indicated that it will make an offer of financial assistance to acquire the line in the Sub-No. 2X abandonment proceeding, and intends to participate likewise in the Sub-No. 3X proceeding.

### **Discussion**

The Port Commission is requesting that the Board strike the notice of consummation, and reopen and reconsider the October 22 Decision extending the time for consummation. Under 49 CFR 1115.3 and 1115.4, the Board has the power to reopen and reconsider based on new evidence or material error. In this instance, when DSR obtained its latest extension it misrepresented to the Board that it was interested in pursuing a sale for continued rail purposes. It is clear now, from the two additional abandonments that have been filed, and from the purported notice of consummation in this proceeding, that DSR never intended or wanted to do a sale for continued rail service; rather it is seeking to force all of the traffic from the Port and the remaining shippers on the Lake Providence Line to move to and from the south, and to eliminate their shipping options. This evidence of DSR's true intent not to make the line available for continued rail service has only been made clear now with its recent filings, and was not available at the time of its request for an extension.<sup>2</sup>

Additionally, the Board should find that the granting of the extension after the consummation deadline had already passed, was material error. The Board's regulations provide that if the consummation notice has not been timely filed, then the abandonment authority "automatically"

---

Providence Line in Arkansas between Lake Village and McGehee. *Delta Southern Railroad, Inc. – Abandonment Exemption – In Desha and Chicot Counties, AR, LA*, STB Docket No. AB 384 (Sub-No. 3X).

<sup>2</sup> It should also be noted that DSR did not give notice of its request for an extension to any other parties to the abandonment proceeding.

expires, and “[i]n that event, a new proceeding would have to be instituted if the railroad wants to abandon the line.” 49 CFR 1152.29(e)(2). In this instance, since DSR did not timely file its notice of consummation, or timely request an extension, the abandonment authority expired, and an extension should not have been granted.<sup>3</sup>

Usually the Board loses jurisdiction when a notice of consummation has been filed. However, the Board has in exceptional circumstances acted to reopen proceedings to protect its jurisdiction. *See CSX Transportation Inc. – Abandonment – Between Bloomingdale and Montezuma, In Parke County, IN*, ICC Docket AB-55 (Sub-No. 486). 2002 STB LEXIS 535, \*11 (“There are rare cases, such as instances of fraud, where we may assert jurisdiction over property after abandonment authority has been exercised.”). *Cf. Missouri-Kansas-Texas Railroad Company – Abandonment – In St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper and Pettis Counties, MO*, STB Docket No. AB 102 (Sub-No. 13), served July 12, 2010, slip op. at 4 (“The Board retains jurisdiction over rail property until abandonment authority has been *lawfully* consummated.” Emphasis added.). Here Board should act.

The Board has established a general requirement that a notice of consummation be filed within one year. *See* 49 CFR 1152.29(e)(2). The reason for the establishment of the consummation notice requirement and the one-year period was to establish certainty in the process. *See Abandonment and Discontinuance of Rail Lines and Transportation Under 49 U.S.C. §10903*, 2 STB 311, 315-317 (1997); *Abandonment and Discontinuance of Rail Lines and Transportation Under 49 U.S.C. §10903*, 1 STB 904-906 (1996). In keeping with this goal, the regulations provide

---

<sup>3</sup> If DSR’s true purpose were to sell the line for continued rail service it would not have been

that requests for extensions of the consummation date are to be filed in advance of the consummation deadline. 49 CFR 1152.29(e)(2). As discussed above, the failure to file a notice of consummation, or to request an extension, by the deadline means that the authority to abandon automatically expires, and a new proceeding is necessary if abandonment is still desired.

In a decision served May 17, 2010, the Board extended the consummation date in this proceeding until October 2, 2010. DSR, however, did not file an extension to extend the consummation date until October 4, 2010. Rather than dismiss the late-filed extension and allow the abandonment authority to expire, the Board, through the Office of Proceedings, accepted DSR's justification for the extension "that the line segment can be sold for continued rail service, and that additional time will be necessary to complete the sale." Decision served October 22, 2010.<sup>4</sup> In and of itself, the failure to follow the regulations that provide for automatic expiration of the abandonment authority was material error.

Further, based on DSR's subsequent actions, it is clear that DSR never intended to sell the remaining 8.2 mile segment for continued rail service. There were no additional discussions and within weeks DSR had filed to abandon a second segment of the line, and a month later, a third segment. It is now clear that the time for consummation had passed, and the only reason that DSR said it wanted to sell the line for continued rail service was to get the time for consummation extended. This new evidence demonstrates that DSR obtained its latest extension to consummate in

---

prejudiced by the expiration of the abandonment authority.

<sup>4</sup> As noted in the May 17 Decision, DSR's request for extension of the previous April 5 deadline was also filed after the expiration of the consummation period. DSR also justified that extension on the grounds that it needed time "in order to permit DSR to negotiate to convey the rail line for continued rail use, which would be consistent with the national rail policy."

this proceeding by misrepresenting its intentions to the Board. Since the extension was obtained by false representations, the notice of consummation should be stricken and extension request should be reopened and reconsidered. In doing so the Board should then deny the extension and find that the abandonment authority expired when the time for consummation passed.

### CONCLUSION

For all of the foregoing reasons, the Port Commission requests that the Board strike the notice of consummation filed by DSR on December 8, 2010, and reopen and reconsider the decision to grant DSR an extension to consummate the abandonment. Instead the Board should find that the authority for abandonment expired, and that if DSR wants to abandon the line, it needs to start a new proceeding.<sup>5</sup>

Respectfully submitted,



Eric M. Hocky  
Thorp Reed & Armstrong, LLP  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103  
215.640.8500  
[ehocky@thorpreed.com](mailto:ehocky@thorpreed.com)

Attorneys for Lake Providence Port  
Commission

Dated: December 23, 2010

---

<sup>5</sup> If DSR, as it has represented to the Board, truly wants to sell the line for continued rail use, then the Port Commission would still be willing to discuss such a purchase. Such a purchase would not be impeded by a finding that DSR's abandonment authority expired.



**VERIFICATION**

I, William W. Gilfoil, Port Director of the Lake Providence Port Commission, verify under penalty of perjury that statements contained in the foregoing Petition are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

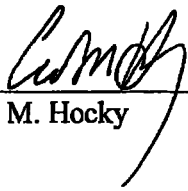
Executed on December 23, 2010.

William W Gilfoil  
Name

### **CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing document was served on the following person by e-mail:

Thomas F. McFarland  
208 South LaSalle Street  
Suite 1890  
Chicago, IL 60604-1112  
[mcfarland@aol.com](mailto:mcfarland@aol.com)

  
\_\_\_\_\_  
Eric M. Hocky

Dated: December 23, 2010